

REMARKS

Applicants thank Examiner Sullivan for the review of the pending application. Claim 1 is currently amended. Support for the amendments is found in, at least, PREPARATION EXAMPLE 1-17 and paragraphs [0007] and [0018]. Claim 3 is new and is supported by, at least, PREPARATION EXAMPLE 1-5 and 13-17. No other claims are pending in the application, and no new matter is added.

For at least the following reasons, all claims are in condition for allowance. In view of the following arguments, all claims are in condition for allowance over the references of record. Therefore, this response is believed to be a complete response to the Office Action.¹ Further, for any instances in which the Examiner took Official Notice in the Office Action, Applicants expressly do not acquiesce to the taking of Official Notice, and respectfully requests that the Examiner provide an affidavit to support the Official Notice taken in the next Office Action, as required by 37 CFR 1.104(d)(2) and MPEP § 2144.03.

35 U.S.C. § 102(b) Rejections

Claim 1 was rejected under 35 U.S.C. § 102(b) as being allegedly anticipated by Peterson, JR et al (2001/0044393). Applicants respectfully traverse this rejection.

To demonstrate anticipation under 35 U.S.C. § 102, the Examiner must show that a single prior art document describes every element of the claimed invention. MPEP § 2131. The identical invention must be shown in as complete detail as is contained in the claim. The elements must be arranged as required by the claim. *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008). This means that the prior art reference must clearly and unequivocally disclose the

¹ As Applicants' remarks and amendments with respect to the Examiner's rejections are sufficient to overcome these rejections, Applicants' silence as to assertions by the Examiner in the Office Action or certain requirements that may be applicable to such rejections (e.g., whether a reference constitutes prior art, motivation to combine references, assertions as to dependent claims, etc.) is not a concession by Applicants that such assertions are accurate or such requirements have been met, and Applicants reserve the rights to analyze and dispute such assertions/requirements in the future.

claimed invention “without *any* need for picking, choosing, and combining” various elements. *Id.* at 1371, *citing In re Arkey* 455 F.2d 586, 587 (CCPA 1972) (emphasis in original).

Amended claim 1 recites an environmentally friendly insect- and plant pathogen-pesticide² that consists essentially of an effective amount of hydrogenated starch hydrolysate for pesticidal activity³ and alkyl glucoside.

The cited reference, Peterson, does not disclose this combination clearly and unequivocally without *any* need for picking, choosing, and combining various ingredients. Peterson discloses a composition that must include a cationic surfactant such as BAC, a nonionic surfactant such as an alkyl polyglucoside, and a polyol such as hydrogenated starch hydrolysate. [Peterson [0011]]. The BAC / cationic surfactant is critical in Peterson because it provides the antimicrobial activity in the claimed antimicrobial liquid. [Peterson, title, Table 1]. The inclusion of the BAC in the Peterson composition provides an important distinction from pending claim 1 because claim 1 recites a transition phrase of “consisting essentially of.” This transition phrase *excludes* additional ingredients that materially affect the basic and novel characteristics of the claimed composition. MPEP 2111.03. Amended claim 1 requires that the pesticide be “environmentally friendly,” as described in paragraphs 0007 and 0018 of the Published Application. This means currently amended claim would exclude cationic surfactants such as BAC as ingredients, because the positively charged surfactants are generally understood to be harsh and not environmentally friendly to those of ordinary skill in the art. See, for example, Larson RJ et al., *Adsorption and biodegradation of cationic surfactants in laboratory and environmental systems*, Dev. Ind. Microbiol. 24 pp. 425-434 (1983). Peterson, by contrast, makes it clear that *all* Peterson

² Applicants dispute that the term “pesticide” is a mere “intended use” for hydrogenated starch hydrolysate, as the Examiner states. Pesticides are classes of compositions that are regulated by the EPA, and the root of the term is recited twice within the body of the claim text. It is not true that any amount of hydrogenated starch hydrolysate satisfy the claim recitations – only an amount that is sufficient to effect pesticidal activity on the overall composition to make it a pesticide, as is regulated by the EPA.

³ Applicants dispute that pesticide is a subgenus of antimicrobials. Indeed, the reverse is true. Antimicrobials have many purposes outside of pesticidal activity, such as the rinse-off cleaning liquid of the Peterson reference. It is well understood in the law that a genus (antimicrobials) does *not* necessarily anticipate a species within the genus. MPEP 2131.02.

combinations *must* include a positively charged surfactant, preferably BAC, in its rinse-off cleansing liquid. [Peterson [0014-0017] Table 1, Table 7].

Regarding claim 3, Peterson only includes 1 example that includes hydrogenated starch hydrolysate. In Table 7, the hydrogenated starch hydrolysate is a part of the polyol ingredient, and it comprises *only 2.0% by weight* of the entire composition. [Peterson Table 7]. In that example, the Peterson composition includes equal parts BAC to hydrogenated starch hydrolysate. [Peterson Table 7]. Claim 3 requires the presence of 30X more hydrogenated starch hydrolysate than is taught by the prior art.

For at least these reasons, Peterson does not anticipate independent claim 1 or dependent claim 3. Withdrawal of the rejection is respectfully requested.

Applicants also assert that Peterson does not render claims 1 or 3 obvious for at least the reasons that one of ordinary skill in the art looking to Peterson would be taught away from excluding a cationic surfactant in a composition because it is the cationic surfactant that provides the critical antimicrobial activity in Peterson. Thus, Applicants believe the amended claims are patentable over Peterson.

CONCLUSION

Applicants believe any fee due has been addressed in the accompanying transmittal, however, if any additional fee is due, please charge our Deposit Account No. 18-0013, under Order No. OTA-0007 from which the undersigned is authorized to draw. To the extent necessary, a petition for extension of time under 37 C.F.R. § 1.136 is hereby made, the fee for which should be charged to such deposit account number.

Application No. 10/562,903
Amendment dated December 28, 2010
Reply to Office Action dated October 6, 2010

Docket No.: OTA-0007

Dated: December 28, 2010

Respectfully submitted,

Electronic signature: /Linda D. Kennedy/
Linda D. Kennedy

Registration No.: 44,183
RADER, FISHMAN & GRAUER PLLC
Correspondence Customer Number: 10291
Attorney for Applicant